trolled premises or any part thereof shall be made by the court except

"in any case, whether falling within any of the preceding paragraphs or not, where the court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accommodation *is available* for the tenant or *will be available* for him when the order or judgment takes effect."

(emphasis is mine)

It would appear from the construction of the above paragraph that it is an essential duty of the landlord to show to the court that either such suitable accommodation is available for the tenant at the time when the proceedings are heard or at a subsequent date on which the court orders the tenant to vacate the controlled premises. Was such suitable accommodation available at the time when the case came up for hearing before the court below or three months afterwards when the order for vacant possession was to have taken effect? I do not think any such accommodation was available at all.

The passages taken from the landlord's evidence read as follows:

"... I have no objection to the Defendant occupying 2 rooms on the 1st floor *until* I get alternative accommodation for her."

"... I can get room for her temporarily – whether she accepts or not I would not know."

My impression of the above evidence is that the landlord could only at the time of the hearing before the Magistrate offer the tenant two rooms out of the whole house until he could get the alternative accommodation for her and that whatever accommodation he could offer her was only of a temporary nature.

If I may echo the words of Lord Porter in the Privy Council case of *Hardial Singh* (*supra*) at pages 183, 184:

"It is true that all the circumstances must be taken into account but after they have all been duly weighed it is still incumbent on the court as an independent and essential requisite that suitable alternative accommodation exists or will exist when any order or judgment for possession takes effect.

Unless this requirement is complied with no court is entitled to make an order, however much it is persuaded that it is reasonable to do so, and though as in this case the learned Judge who tried the case finds it reasonable there was in their Lordships' view no evidence of suitable alternative accommodation."

The evidence in this case does not support the conclusion on reasonableness or the availability of suitable alternative accommodation arrived at by the learned Magistrate. I therefore allowed this appeal and set aside the order made by the court below. The respondent should pay the costs of the proceedings.

Appeal allowed.

Solicitors: *Tay Leong Siak & Co.; Goh Soot Hwang & Co.*

UNITED NATIONAL FINANCE BHD. v. TAN YAM SING & ORS.

[A.C.J. (Mustapha Hussain J.C.) December 1, 1981 & January 28, 1982]
[Penang – Civil No. 11 of 1979]

Stamp Ordinance – Promissory note unconditional and unstamped – Effect of – Stamp Ordinance 1949, ss. 2 & 41.

Contract – Memorandum of Agreement – Whether promissory note.

The appellant lent $5,000 to the respondent under a Memorandum of Agreement, which was signed by the borrowers/respondents and the surety, and also the appellant. The Memorandum was signed and executed on June 6, 1975 but it was stamped one day after execution. The respondents defaulted in payment of the loan and the appellant filed a claim for the balance of $1,666.72 against the respondents and the surety.

At the trial learned counsel for the respondents successfully objected to the admissibility of the Memorandum of Agreement for a loan on the ground that it was a promissory note within the meaning of section 2 of the Stamp Ordinance 1949 and that it was not stamped in accordance with section 41 of the said Ordinance.

The sole issue before the appeal court was whether the Memorandum of Agreement was a promissory note.

Held, dismissing the appeal: (1) to be a promissory note there must be an unconditional promise to pay a certain sum and it must be in one entire instrument. It must be a promise to pay absolute and must not depend on a contingency or a stipulation.

(2) the Memorandum in this case contained a promise to pay and is not coupled with any stipulation or any contingency. The fact that there was a clause where the surety would be liable if the borrower defaulted and that the lender could recall the balance of the loan at any time, were purely arrangements of the "promise to pay" and did not in any way affect the character of the promissory note.

Cases referred to:–

(1) *Alagappa Chettiar* v. *Freedam Shah* [1977] 2 M.L.J. 147.

(2) *Yates* v. *Evans* (1892) 61 L.J.Q.B. 446.

CIVIL APPEAL.

Gan Teik Chee for the appellant.
Yeap Ghim Guan for the respondents.

Cur. Adv. Vult.

Mustapha Hussain J.C.: The appellant, a lending company, lent $5,000/= to the Respondent. The Respondent executed a Memorandum of Agreement for a loan (I.D.3) where the borrowers (the Respondents) and the Surety had signed, so also the Appellant signed it.

Earlier on the same day, the Respondent and the Surety had applied for the loan and the application was made by a formal application for a general loan.

The Memorandum (I.D.3) which was signed and executed on June 6, 1975 was stamped on June 7, 1975, one day after execution. The stamp duty paid was $22/=.

The Respondents/Borrowers defaulted in payments of instalments towards the loan and the Appellant filed a claim for the balance of $1,666.72¢ together with interest in the Sessions Court. The Appellant also brought in the Surety.

At the trial in the Sessions Court learned counsel successfully objected to the admissibility of this Memorandum of Agreement for a loan (I.D.3) saying that this instrument is a promissory note within the meaning of section 2 of the Stamp Ordinance No. 59 of 1949 and that it was not stamped in accordance with section 41 thereto. I.D.3 was stamped the next day after execution. Since the learned President upheld the objection, the appellant's claim was dismissed with costs.

The sole issue, both at the trial and in this appeal is whether I.D.3 (the Memorandum of Agreement) is a promissory note.

Prior to the execution of the Memorandum (I.D.3) the Respondent had applied for the said loan supported by the Surety. This form is a general application where the name of the borrower and the guarantor together with the amount applied for and the method of repayment is stated. This form is nothing more than the usual application for a loan which is not different from a verbal application.

The Memorandum I.D. 3 contained all the particulars of the loan, the method of repayment, the guarantee by the Surety (i.e. a promise to pay of a fixed sum) and it was signed by the borrower and guarantor (the Respondents here) and also by the Appellant. The question is whether I.D.3 is a promissory note or just an agreement of a loan.

It is clear law (*Alagappa Chettiar* v *Freedam Shah*)[1] that if there is a stipulation in the Memorandum apart from the promise to pay, then it is not a promissory note. To be a promissory note, there must be an unconditional promise to pay a certain sum and it must be in one entire instrument. It must be a promise to pay absolute and must not depend on a contingency or a stipulation.

In this appeal I.D. 3 the Memorandum contains this promise to pay and to pay a definite sum. This promise is not coupled with any stipulation or any contingency. It is a straightforward promise and the fact that an earlier application for the loan was made did not make it a contingency to this promise to pay. The fact that there is a clause where the surety will be liable if the borrower defaulted and that the lender could recall the balance of the loan at any time, are purely arrangements of the "promise to pay" and do not in any way affect the character of the promissory note. *Yates* v. *Evans*[2]

Therefore the appeal is dismissed with costs.

Appeal dismissed

Solicitors: *Gan Teik Chee & Ho; Yeap & Co.*

NG LEAN TEIK v. NG POH HUAT

[A.C.J. (Mustapha Hussain J.C.) December 1, 1981 & February 5, 1982]
[Penang – Civil Appeal No. 47 of 1980]

Damages – Quantum – Fracture of mandible - Award of $8,000 – Whether excessive.

This was an appeal by the appellant/defendant against the quantum awarded by the learned President. The plaintiff suffered (a) swelling on neck of mandibular region; (b) swelling on periorbital region; (c) abrasion on (L) elbow; (d) two abrasions on dorsum of (L) foot; (e) small abrasion on (L) ankle and (f) fracture of mandible bone. The learned President had awarded the plaintiff $8,000 as general damages for the said injuries.

Held, dismissing the appeal: the Court is of the opinion that though it may not be appropriate to refer to the Digest of Cases when making awards, and though the figure awarded is more than the trend, the award made is not